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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/941,400	08/28/2001	Devin Eugene Mix	12929.1064US01	6151
23552	7590	02/22/2005	EXAMINER	
MERCHANT & GOULD PC P.O. BOX 2903 MINNEAPOLIS, MN 55402-0903				GREEN, BRIAN
ART UNIT		PAPER NUMBER		
		3611		

DATE MAILED: 02/22/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	09/941,400	MIX, DEVIN EUGENE	
	<b>Examiner</b>	<b>Art Unit</b>	
	Brian K. Green	3611	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

1) Responsive to communication(s) filed on 03 December 2004.

2a) This action is FINAL.                    2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

4) Claim(s) 1-34 and 36-48 is/are pending in the application.

4a) Of the above claim(s) 4,6,15,17,24,30,38 and 44 is/are withdrawn from consideration.

5) Claim(s) \_\_\_\_\_ is/are allowed.

6) Claim(s) 1-3,5,7-14,16,18-23,25-29,31-34,36,37,39-43 and 45-48 is/are rejected.

7) Claim(s) \_\_\_\_\_ is/are objected to.

8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a) All    b) Some \* c) None of:

1. Certified copies of the priority documents have been received.
2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)	4) <input type="checkbox"/> Interview Summary (PTO-413)
2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)	Paper No(s)/Mail Date. _____.
3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____.	5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)
	6) <input type="checkbox"/> Other: _____.

**DETAILED ACTION*****Specification***

The specification is objected to as failing to provide proper antecedent basis for the claimed subject matter. See 37 CFR 1.75(d)(1) and MPEP § 608.01(o). Correction of the following is required: Stating in claim 1 that the front panel is arranged in a generally upright, vertical position, the vertical axis being substantially parallel with the front panel, and the blower at an axially spaced apart location from the moving member in a direction along the vertical axis. Stating in claim 12 that the vertical axis of rotation is aligned substantially parallel with the vertical orientation of the at least one panel of the enclosure and the blower moves air in a direction along the vertical axis of rotation of the moving member towards the moving member. Stating in claim 23 that the flame element extends in an upright vertical direction when the flame simulation apparatus is in use and the vertical axis of rotation extending in a direction parallel to the upright, vertical direction in which the flame element extends, and the blower is positioned at an axially spaced apart location from the mechanical device in a direction along the vertical axis of rotation. Stating in claim 29 that the enclosure includes a vertically upright oriented front panel, the flame element extending in a upright, vertical direction when the apparatus is in use, moving the flame element about a vertical axis that is generally parallel to the vertically upright orientation of the front panel, and a blower configured to blow air in a direction along the vertical axis. Stating in claim 37 that the flame element extends in an upright vertical direction and the vertical axis extends in a direction parallel to the direction in which the flame element extends, and the blower is positioned at an axially spaced apart location from the mechanical device in a direction along the vertical axis. Stating in claim 43 that the only one panel having a

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generally upright, vertical orientation, the vertical axis being aligned parallel with the upright, vertical orientation of the only one panel, and the blower is positioned at a location spaced apart from the flame element in a direction along the vertical axis vertically above or below the flame element.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-3,7,12-14,18,23,25,28,37,39,40,43, and 46 are rejected under 35 U.S.C. 103(a) as being unpatentable over Rasmussen (U.S. Patent No. 2,055,910) in view of Pyper (U.S. Patent No. 1,382,229).

Rasmussen shows in figures 10 and 11 a “fireplace” for simulating a fire comprising a front panel (57) arranged in a generally upright, vertical position, a flame simulation apparatus including a flame element (64,65) directly viewable through the front panel, a moving member (68,71) defining a plurality of blades (the member 71 is considered to include blades, see figure 8 which shows blade portions 51 on a similar type of structure as member 71), the moving member being coupled to the flame element and configured to move the flame element from a fixed position, the moving member being adjustable about a vertical axis to move the flame element, the vertical axis being substantially parallel with the front panel (57), and a device (70) for moving air at an axially spaced apart location from the moving member in a direction along the vertical axis. Rasmussen does not disclose making the device (70) in the form of a blower.

Pyper shows in figures 3 and 4 a device in the form of a blower (28,29) for rotating a display device (20). In view of the teachings of Pyper it would have been obvious to one in the art to modify Rasmussen by replacing the device (70) with a blower since this would allow the speed at which the moving member is rotated to be varied as desired, i.e. to create a more amusing and realistic display. In regard to claims 2 and 13, the blower would blow air along the vertical axis, see figure 11. In regard to claims 3,14,28, and 39 the blower is located vertically below the flame element. In regard to claims 7,18,25,40, and 46, Rasmussen shows in figure 11 a light source (63). In regard to claim 12, Rasmussen shows in figures 10 and 11 that the enclosure includes a plurality of panels (57,59,60) and that the flame element is viewable through at least one vertically oriented panel (57) of the enclosure. In regard to claim 37, this is the manner in which the device of Rasmussen in view of Pyper would be used.

Claims 5,16, and 45 are rejected under 35 U.S.C. 103(a) as being unpatentable over Rasmussen (U.S. Patent No. 2,055,910) in view of Pyper (U.S. Patent No. 1,382,229) as applied to claims 1,12, and 43 above and further in view of Hsieh (U.S. Patent No. 6,312,137).

Rasmussen in view of Pyper disclose the applicant's basic inventive concept except for making the flame element from a single piece of flat material having a flame shape. Hsieh shows in figures 1-3 a flat material having a flame shape (8) that is moved to simulate a real flame. In view of the teachings of Hsieh it would have been obvious to one in the art to modify Rasmussen by making the flame element from a single flat piece of material since this would allow the flame element to be made in an easier and faster manner.

Claims 5,8,16,19,26,41,45, and 47 are rejected under 35 U.S.C. 103(a) as being unpatentable over Rasmussen (U.S. Patent No. 2,055,910) in view of Pyper (U.S. Patent No. 1,382,229) as applied to claims 1,12, and 43 above and further in view of Butterfield (U.S. Patent No. 4,965,707).

In regard to claims 5,16, and 45,Rasmussen in view of Pyper disclose the applicant's basic inventive concept except for making the flame element from a single piece of flat material having a flame shape. Butterfield shows in figures 3a and 3b a flat material having a flame shape (14) that is moved to simulate a real flame. In view of the teachings of Butterfield it would have been obvious to one in the art to modify Rasmussen by making the flame element from a single flat piece of material since this would allow the flame element to be made in an easier and faster manner. In regard to claims 8,19,26,41, and 47, Rasmussen in view of Pyper disclose the applicant's basic inventive concept except for making the flame element from a silk material. Butterfield shows in figures 1-5 a flame element (14) that is moved to simulate a real flame that is made from a silk material, see column 3, lines 65-68. In view of the teachings of Butterfield it would have been obvious to one in the art to modify Rasmussen by making the flame element from a silk material since this would allow the flame element to be made in an easier and faster manner and would present a more realistic display.

Claims 9,20,27,42, and 48 are rejected under 35 U.S.C. 103(a) as being unpatentable over Rasmussen (U.S. Patent No. 2,055,910) in view of Pyper (U.S. Patent No. 1,382,229) as applied to claims 1,12,23,37, and 43 above and further in view of Hsieh (U.S. Patent No. 6,312,137) and Pratt (U.S. Patent No. 4,913,940).

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Rasmussen in view of Pyper disclose the applicant's basic inventive concept except for stiffening the edge portion of the flame element. Hsieh shows in figures 1-3 a flat material having a flame shape (8) that is moved to simulate a real flame. Pratt shows in figure 1 the idea of stiffening (5) the edge of a flexible display sheet. In view of the teachings of Hsieh and Pratt it would have been obvious to one in the art to modify Rasmussen by making the flame element from a flexible sheet material having stiffened edge portions since this would allow the flame element to be made in an easier and faster manner and would make the flame element more durable and resistant to damage.

Claims 9,20,27,42, and 48 are rejected under 35 U.S.C. 103(a) as being unpatentable over Rasmussen (U.S. Patent No. 2,055,910) in view of Pyper (U.S. Patent No. 1,382,229) as applied to claims 1,12,23,37, and 43 above and further in view of Butterfield (U.S. Patent No. 4,965,707) and Pratt (U.S. Patent No. 4,913,940).

Rasmussen in view of Pyper disclose the applicant's basic inventive concept except for stiffening the edge portion of the flame element. Butterfield shows in figures 1-3 a flat material having a flame shape (14) that is moved to simulate a real flame. Pratt shows in figure 1 the idea of stiffening (5) the edge of a flexible display sheet. In view of the teachings of Butterfield and Pratt it would have been obvious to one in the art to modify Rasmussen by making the flame element from a flexible sheet material having stiffened edge portions since this would allow the flame element to be made in an easier and faster manner and would make the flame element more durable and resistant to damage.

Claims 10,21,29,31, and 32 are rejected under 35 U.S.C. 103(a) as being unpatentable over Rasmussen (U.S. Patent No. 2,055,910) in view of Pyper (U.S. Patent No. 1,382,229) as applied to claims 1,12, and 23 above and further in view of Mikolay (U.S. Patent No. 5,237,766).

Rasmussen in view of Pyper disclose the applicant's basic inventive concept except for placing a partial mirror surface on the back panel and side panels. Mikolay shows in figure 4 the idea of placing a mirror surface on the panels of an enclosure, see column 4, lines 46-65. In view of the teachings of Mikolay it would have been obvious to one in the art to modify Rasmussen by attaching mirror surfaces to the panels since this would allow the flame element to be illuminated in a more brilliant manner to create a more eye-catching display. The applicant indicates that partial mirrored surfaces or completely mirrored surfaces can be used, see the specification, page 6, lines 1-2. Therefore, the use of partial mirrored surfaces or completely mirrored surfaces are considered to be obvious equivalents. Mikolay only discloses placing the mirrored surfaces on the side panels. It is considered within one skilled in the art to place the mirrored surface on the back wall as well since this would increase the amount of light reaching the flame element. In regard to claim 31, the blower of Rasmussen in view of Pyper would be positioned below the flame element. In regard to claim 32, Rasmussen shows in figure 11 a light source (63).

Claims 11 and 22 are rejected under 35 U.S.C. 103(a) as being unpatentable over Rasmussen (U.S. Patent No. 2,055,910) in view of Pyper (U.S. Patent No. 1,382,229) as applied to claims 1 and 12 above and further in view of Hess et al. (U.S. Patent No. 5,642,580).

Rasmussen in view of Pyper disclose the applicant's basic inventive concept except for placing a log set between the front panel and the flame element. Hess et al. shows in figures 1

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and 2 a simulated fireplace comprising a front panel (24), flame element (58) and a log set (26) located between the front panel and flame element. In view of the teachings of Hess et al. it would have been obvious to one in the art to modify Rasmussen by attaching a log set between the front panel and flame element since this would allow the device to simulate a fireplace in a more amusing and realistic manner.

Claim 33 is rejected under 35 U.S.C. 103(a) as being unpatentable over Rasmussen (U.S. Patent No. 2,055,910) in view of Pyper (U.S. Patent No. 1,382,229) and Mikolay (U.S. Patent No. 5,237,766) as applied to claim 29 above and further in view of Butterfield (U.S. Patent No. 4,965,707).

Rasmussen in view of Pyper and Mikolay disclose the applicant's basic inventive concept except for making the flame element from a silk material. Butterfield shows in figures 1-5 a flame element (14) that is moved to simulate a real flame that is made from a silk material, see column 3, lines 65-68. In view of the teachings of Butterfield it would have been obvious to one in the art to modify Rasmussen by making the flame element from a silk material since this would allow the flame element to be made in an easier and faster manner and would present a more realistic display.

Claim 34 is rejected under 35 U.S.C. 103(a) as being unpatentable over Rasmussen (U.S. Patent No. 2,055,910) in view of Pyper (U.S. Patent No. 1,382,229) and Mikolay (U.S. Patent No. 5,237,766) as applied to claim 29 above and further in view of Hsieh and Pratt.

Rasmussen in view of Pyper and Mikolay disclose the applicant's basic inventive concept except for stiffening the edge portion of the flame element. Hsieh shows in figures 1-3 a flat material having a flame shape (8) that is moved to simulate a real flame. Pratt shows in figure 1 the idea of stiffening (5) the edge of a flexible display sheet. In view of the teachings of Hsieh and Pratt it would have been obvious to one in the art to modify Rasmussen by making the flame element from a flexible sheet material having stiffened edge portions since this would allow the flame element to be made in an easier and faster manner and would make the flame element more durable and resistant to damage.

Claim 34 is rejected under 35 U.S.C. 103(a) as being unpatentable over Rasmussen (U.S. Patent No. 2,055,910) in view of Pyper (U.S. Patent No. 1,382,229) and Mikolay as applied to claim 29 above and further in view of Butterfield (U.S. Patent No. 4,965,707) and Pratt (U.S. Patent No. 4,913,940).

Rasmussen in view of Pyper and Mikolay disclose the applicant's basic inventive concept except for stiffening the edge portion of the flame element. Butterfield shows in figures 1-3 a flat material having a flame shape (14) that is moved to simulate a real flame. Pratt shows in figure 1 the idea of stiffening (5) the edge of a flexible display sheet. In view of the teachings of Butterfield and Pratt it would have been obvious to one in the art to modify Rasmussen by making the flame element from a flexible sheet material having stiffened edge portions since this would allow the flame element to be made in an easier and faster manner and would make the flame element more durable and resistant to damage.

Claim 36 is rejected under 35 U.S.C. 103(a) as being unpatentable over Rasmussen (U.S. Patent No. 2,055,910) in view of Pyper (U.S. Patent No. 1,382,229) and Mikolay as applied to claim 29 above and further in view of Hess et al. (U.S. Patent No. 5,642,580).

Rasmussen in view of Pyper and Mikolay disclose the applicant's basic inventive concept except for placing a log set between the front panel and the flame element. Hess et al. shows in figures 1 and 2 a simulated fireplace comprising a front panel (24), flame element (58) and a log set (26) located between the front panel and flame element. In view of the teachings of Hess et al. it would have been obvious to one in the art to modify Rasmussen by attaching a log set between the front panel and flame element since this would allow the device to simulate a fireplace in a more amusing and realistic manner.

*Response to Arguments*

Applicant's arguments with respect to the claims have been considered but are moot in view of the new ground(s) of rejection.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Brian K. Green whose telephone number is (703) 308-1011. The examiner can normally be reached on M-F 7am-3:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Lesley Morris can be reached on (703) 308-0629. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

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*Brian K. Green*  
BRIAN K. GREEN  
PRIMARY EXAMINER

Bkg  
Feb. 18, 2005